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Libel -- Absolute Privilege of a County Executive Official

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strict liability the owner will still be open to a liability judgment without adequate insurance protection. It remains for the courts to resolve the problem with a clear and precise pronouncement.

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LIBEL—ABSOLUTE PRIVILEGE OF A COUNTY EXECUTIVE OFFICIAL

Defendant, County Manager of Metropolitan Dade County, dismissed the sheriff from his job. The manager explained his reasons for the dismissal in a written communication delivered to each of the individual members of the Dade County Commission. The former sheriff, alleging that the publication defamed him, brought action for libel against the county manager. The defendant's motion to dismiss was granted in the circuit court on the grounds that the defendant had, as a matter of law, an absolute privilege to publish the alleged libelous matter. The Third District Court of Appeal reversed, holding that executive officials of county government are only qualifiedly privileged as to defamatory publications made in connection with their office.[1] On certiorari[2] to the Supreme Court of Florida, *held*, reversed: executive officials of government are absolutely privileged as to defamatory publications made in connection with the duties and responsibilities of their office. *McNayr v. Kelly*, 184 So.2d 428 (Fla. 1966).

The tort action for libel affords the individual a means to recover damages for injury done to his reputation.[3] Privilege is a defense to the action. Privilege may be absolute or it may be qualified.[4] The proper assertion of the defense of absolute privilege, when its existence is evident on the face of the answer, is sufficient to cause the suit to be dismissed as a matter of law.[5] A qualified privilege, on the other hand, will be lost upon a showing by the plaintiff that the defamatory statement was uttered with malice.[6] However, where there is an absolute privilege, the defamer is shielded from the threat of civil liability, regardless of malice.[7]

Absolute privilege was developed to facilitate governmental func-

1. Kelly v. McNayr, 175 So.2d 568 (Fla. 3d Dist. 1965).
2. Certiorari was granted by the Supreme Court of Florida as a matter of public interest.
3. Note, *Developments in the Law of Defamation*, 69 HARV. L. REV. 875 (1956).
4. The qualified privilege is sometimes termed "conditional."
5. *Supra* note 1.
6. Gray v. Mossman, 88 Conn. 247, 90 Atl. 938 (1914); Raymond v. Croll, 233 Mich. 268, 206 N.W. 556 (1925).
7. See, *e.g.*, Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940).

tions at the legislative[8] and judicial levels.[9] The United States Constitution specifically protects members of the Congress from civil actions for defamatory statements made during congressional sessions.[10] The participants in judicial proceedings, at all levels,[11] are clothed with immunity from civil action for libel as long as the published statements are relevant to the inquiry.[12]

The earliest application of absolute privilege to the executive branch of government occurred in England, and was first extended to members of the executive hierarchy of cabinet rank.[13] Historically, those who have had their reputation injured have attacked executive public officials holding office at all levels of government for alleged irresponsible and malicious publications. In the United States, at the federal level, the Supreme Court first faced such an allegation in the celebrated case of *Spalding v. Vilas*,[14] which concerned the Postmaster General of the United States. In *Spalding*, the Court granted the absolute privilege to a high ranking member of the executive branch of government; thus it recognized the inadequacy of a qualified privilege by concluding that "[I]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government . . . ."[15]

In an interesting series of cases dealing with accusations of defamation by federal officials, the doctrine of absolute privilege has been clearly defined as an immunity that attaches at all policy-making levels of the federal employment structure.[16] The judicial extension of the grant of absolute privilege to subordinate employees in the executive department was accomplished in *Barr v. Matteo*,[17] which dealt the death blow to high rank as the major test on the federal level. Speaking for a divided court,[18] Harlan, J. said:

> We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank . . . . The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective func-

8. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 474 (1909).

9. See *infra* note 10.

10. U.S. CONST., art. 1, § 6 provides that "for any Speech or Debate in either House, they shall not be questioned in any other Place."

11. Rammage v. Kendall, 168 Ky. 26, 181 S.W. 631 (1916).

12. See, *e.g.*, Hardtner v. Salloum, 148 Miss. 346, 114 So. 621 (1927).

13. Chatterton v. Sec. of State for India in Council, [1895] 2 Q.B. 189 (C.A.).

14. 161 U.S. 483 (1896).

15. *Id.* at 498.

16. See, *e.g.*, Barr v. Matteo, 360 U.S. 564 (1959) (acting director of the office of Rent Stabilization); Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940) (Cabinet Officer); Smith v. O'Brien, 88 F.2d 769 (D.C. Cir. 1937) (Member of the Federal Tariff Commission); Miles v. McGrath, 4 F. Supp. 603 (D. Md. 1933) (Naval Officer).

17. *Supra* note 16.

18. The decision in *Barr* was 5 to 4.

> tioning of government . . . . It is not the title of his office but the duties with which the particular officer . . . is entrusted. . . . which must provide the guide. . . .[19]

Absolute privilege, as evolved in the federal decisions, has been grounded upon the overriding demands of public interest, which requires that public officials be free from the fear and expense of litigation while they are administering the public trust.[20]

In order for a federal executive employee to avail himself of the defense of absolute privilege, the subject matter of the suit must be "more or less connected" with the scope of executive authority,[21] or within the "outer perimeter" of the line of duty of the official,[22] or related to matters committed to him for determination.[23]

Federal employees are uniquely under federal protection. The Supreme Court in *Howard v. Lyons*[24] held that federal employees must be "judged by federal standards to be formulated by the courts in the absence of legislative action by Congress."[25] The determination of whether absolute privilege is available to federal employees is not to be left to the "vagaries of the laws of the several states."[26] The result of this decision has been to create a body of federal common law applicable to federal employees who are sued in either a federal or state court. This law is to be applied even though the state law varies substantially from the federal position.[27]

With the advent of the *Spalding* decision,[28] many states groped for a position to take with regard to state executive officials. Several states[29]

19. *Supra* note 16, at 572.

20. For a brilliant analysis by Learned Hand, J. of many of the policy considerations involved, see Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

21. Spalding v. Vilas, *supra* note 14.

22. Preble v. Johnson, 275 F.2d 275 (10th Cir. 1960).

23. Barr v. Matteo, *supra* note 16.

24. 360 U.S. 593 (1959).

25. *Id.* at 597. The commitment of the Supreme Court to absolute privilege for federal employees has imposed a peculiar problem on those state courts that follow the doctrine of qualified privilege, insofar as the federal common law must be applied to federal officers sued in state courts. Carr v. Watkins, *infra* note 27, illustrates the difficulty. In that case there were three defendants. One was a federal employee, and two were county officials. The state court in Maryland applied the federal rule of absolute privilege to the federal employee and limited the county employees to the Maryland rule of qualified privilege. It appears to be a juris-prudential absurdity when one court must apply two inconsistent standards to substantially the same facts, and the only significant measure of liability depends upon whether the employer is the federal or the state government.

26. *Ibid.*

27. Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962). It is noteworthy that the protection of absolute privilege of federal employees has been extended to other tort liabilities. See, *e.g.*, Gregoire v. Biddle, *supra* note 20 (suit for false imprisonment against Attorney General and subordinate officials); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927) (suit for malicious prosecution against Special Ass't to the Attorney General).

28. *Supra* note 14.

29. CAL. CIV. CODE § 47(1)(2) (1961); IOWA CODE ANNO. ch. 659.1 n.55 (1946);

enacted statutes which provided executive officials with a privilege in an action for defamation for any publication made "in the proper discharge of an official duty."[30] Several of the state courts that have had occasion to consider the protection afforded by the statutory privilege have construed the privilege to be absolute.[31]

It appears that the greater number of states that have ruled upon the extent of the privilege for state executive officials, whether or not under a statutory authority, have decided that an absolute privilege is available.[32] The early cases, however, adhered to the restricted view that the absolute privilege, as applied to the executive functionary, must be limited to an "act of state."[33] After *Spalding*,[34] many states liberalized this view by including any publication "more or less connected" with the official duty of executive officials in state government,[35] and even prior to *Barr*, appeared to reject high rank as a requirement for invoking the privilege.[36]

MONT. REV. CODES § 64-208 (1947); NO. DAK. CENTURY CODE vol. 3-14-02-05 (1947); OKLA. STAT. ANNO. ch. 25-12 § 1443 (1951); UTAH C.A. 45-2-3 (1953).

30. Typical statute: OKLA. STAT. ANNO. ch. 25-12 § 1443 (1951):

A privileged publication or communication is one made:

First. In any legislative or judicial proceeding or any proceeding authorized by law;

Second. In the proper discharge of an official duty; . . .

31. Kelly v. Daro, 47 Cal.2d 418, 118 P.2d 37 (2d Dist. Ct. App. 1941). Construed § 47(1)(2) of CAL. CIV. CODE as giving rise to an absolute privilege, where the libel occurred during legislative investigative proceedings. Sanford v. Howard, 185 Okla. 660, 95 P.2d 644 (1939), construed 12 OKLA. ST. ANN. § 1443 (1951) and held remarks by University President at meeting of Board of Regents concerning the plaintiff, a school employee, as absolutely privileged. Carter v. Jackson, 10 Utah 2d 284, 351 P.2d 957 (1960) construed § (2) of U.C.A. 45-2-3 as covering with absolute privilege statements pertinent to any meeting of a city council authorized by law.

32. See, *e.g.*, *infra* notes 37 through 46. See also, Green, *The Right to Communicate*, 35 N.Y.U.L. REV. 903, 908 (1960).

Except for some jurisdictions in which minor officials may still be held liable for malicious statements if the victim can successfully prove their malicious quality, the immunity of officials is complete.

33. Chatterton v. Sec. of State for India in Council, *supra* note 13. The term "act of state" apparently was first used in this case and adopted by American courts. The court stated, "the document complained of is an act of state," and therefore, absolutely privileged. See also, Hassett v. Carroll, 85 Conn. 23, 81 Atl. 1013 (1911) (dictum); Whitcomb v. Hearst Corp., 329 Mass. 193, 107 N.E.2d 295 (1952) (court held the "Stars & Stripes" was not an "act of state" or an "official communication of the government."); Bigelow v. Brumley, 138 Ohio St. 574, 37 N.E.2d 584 (1941) (defines an act of state as "official acts of the chief executive officers of state or nation").

34. Spalding v. Vilas, *supra* note 14.

35. Green v. Hoiriis, 103 So.2d 226 (Fla. 3d Dist. 1958) (communications made in connection with administration of the Unemployment Compensation Act, FLA. STAT. § 443.16 (3), are absolutely privileged); Barton v. Rogers, 21 Idaho 609, 123 P. 478 (1912) (publications of Board of Trustees of an independent school district acting within scope of official duty are absolutely privileged); Haskell v. Perkins, 165 Ill. App. 144 (1911) (communications between public officials pertaining to their duties are absolutely privileged.); Sanford v. Howard, 185 Okl. 660, 95 P.2d 644 (1939) (oral report of misconduct made in compliance with Board of Regents' request was absolutely privileged).

36. See, *e.g.*, Catron v. Jasper, 303 Ky. 598, 198 S.W.2d 322 (1946); Montgomery v. City of Phila., 392 Pa. 178, 140 A.2d 100 (1958).

State courts have held that the absolute privilege is available in a series of cases involving a sheriff,[37] members of a district school board,[38] a borough president,[39] a building inspector,[40] a city architect,[41] officials of a county health department,[42] members of a city council,[43] a mayor,[44] a president of a state university,[45] and a state highway commissioner.[46]

The tests applied by state courts have varied in their emphasis. It appears that greater reliance has been placed upon whether the executive official's act or statement was "within his jurisdiction" or within the scope of an official duty rather than on the indeterminate ground of high rank.[47] More recently, state courts appear to have followed the rule established in the *Barr* decision and have discredited high rank as a valid standard.[48]

Statements made during proceedings of city councils or city commissions have on rare occasions been shielded by an absolute privilege on the ground that the council or commission proceedings are quasi-legislative in character, so as to be considered a delegated extension of the state legislative power, and are therefore held to partake of the absolute privilege accorded to statements made in the state legislature.[49] However, in the majority of such cases,[50] absolute privilege has been extended on the ground that the statement pertained to the duties of the members of the council in the proper conduct of their official business, or that it had a "reasonable relationship" to the subject of the meeting.[51]

In certain jurisdictions, city and county executive public officials

37. Catron v. Jasper, *supra* note 36.

38. Barton v. Rogers, *supra* note 35.

39. Sheridan v. Crisona, 14 N.Y.2d 108, 249 N.Y.S.2d 161, 198 N.E.2d 359 (1964).

40. Montgomery v. City of Phila., *supra* note 36.

41. *Ibid.*

42. Powers v. Vaughan, 312 Mich. 297, 20 N.W.2d 196 (1945).

43. Bolton v. Walker, 197 Mich. 699, 164 N.W. 420 (1917).

44. Trebilcock v. Anderson, 117 Mich. 39, 75 N.W. 129 (1898).

45. Hughes v. Bizzell, 189 Okla. 472, 117 P.2d 763 (1941).

46. Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961).

47. See *supra* note 36.

48. See, *e.g.*, Sheridan v. Crisona, *supra* note 39, at 362, 249 N.Y.S.2d, at 166. To the grant of absolute privilege to Borough President of Queens in New York City, Dye, J. dissented: "[B]y a decisional law this court is extending an absolute immunity for defamatory statements made in their official duties, a privilege never heretofore enjoyed by that group of officials."
Contra, Bigelow v. Brumley, 138 Ohio 574, 37 N.E.2d 584 (1941). The court held that absolute privilege was available to appointees of the Governor as being within the "official acts of the chief executive officers of state or nation."

49. Tanner v. Gault, 20 Ohio App. 243, 244, 153 N.E. 124, 125 (1925) (dictum); Carter v. Jackson, 10 Utah 2d 284, 351 P.2d 957 (1960). The rule of absolute privilege extends to "the proceedings of all legislative bodies, state or municipal."

50. Larson v. Doner, 32 Ill. App. 2d 471, 472, 178 N.E.2d 399, 401 (1961). "[T]he rule that publication of defamatory matter in the due course of legislative proceedings is absolutely privileged is broad and comprehensive and includes all such proceedings, whether federal, state or municipal."

51. Larson v. Doner, *supra* note 50; Carter v. Jackson, *supra* note 49.

have been denied an absolute privilege.[52] Despite admissions by the courts that the act or publication took place on a privileged occasion,[53] the grant of privilege has been intentionally restricted to a qualified one.[54] In *Mills v. Denny*,[55] the court stated that the

> qualified privilege adequately protects such public officials who in good faith make bona fide statements . . . . Such immunity is sufficient for of itself it abrogates the rule that every defamatory publication implies malice.[56]

There are those who fear that the strong policy considerations that have created the rule of absolute privilege for federal employees,[57] and which have been responsible for the trend toward absolute immunity for state officials, may be misapplied at the city and county level.[58] Advocates of the restrictive view urge that the individual's right to the safeguards of legal redress for malicious destruction of his reputation by unscrupulous and irresponsible local officials is a sacred right. In these jurisdictions, it is urged that absolute immunity be confined to cases where there is ultimate supervision and control of local executive officials by other authorities.[59]

Florida precedent for absolute privilege has been restricted to judicial proceedings[60] and to a single statutory immunity.[61] In one Florida

52. Gray v. Mossman, 88 Conn. 247, 90 Atl. 938 (1917). (National Guard officer); McClendon v. Cloverdale, 203 A.2d 815 (Del. 1964) (member of city council); Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222 (1954) (mayor and member of city council); Howland v. Flood, 160 Mass. 509, 36 N.E. 482 (1894); Peterson v. Steenerson, 113 Minn. 87, 129 N.W. 147 (1910) (local district postmaster).

53. See, *e.g.*, Schlinkert v. Henderson, 331 Mich. 284, 287, 49 N.W.2d 180, 183 (1951).

> [a] privileged occasion is an occasion when the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter.

54. *Supra* note 52.

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56. *Supra* note 52, at 593. The rationale is advanced that an executive who acts in good faith has adequate protection under the law with a qualified privilege. If he does not act in good faith he is a danger to the community, and it is morally indefensible that he be immune from suit. In fact, the fear is that the grant of power of absolute privilege is so great that it may encourage abuse.

57. See, *e.g.*, Glass v. Ickes, *supra* note 16.

58. This fear is clarified in such cases as Mills v. Denny, *supra* note 52.

59. Concurring in Glass v. Ickes, *supra* note 16, at 282, Groner, J. said:

> [I] express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law.

His statements were directed to a case involving a federal official of cabinet rank; nevertheless, the reasoning appears to be particularly appropriate to the question of the accountability of city and county officials.

60. Ryon v. Shaw, 77 So.2d 455 (Fla. 1955). (A report by members of a grand jury was libelous. The court held that jurors, in performance of their duty, are privileged to publish defematory matter, if related to the cause. As to the immunity attached to legislative proceedings, Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927) findings reported by

case, absolute privilege was extended to the proceedings conducted by a quasi-judicial adminstrative officer, who was required to exercise a "pure judicial power."[62] Barring these exceptions, the only privilege heretofore recognized by Florida courts has been the qualified one. "To be privileged, the communication must be by, and to, one who has a right, duty or interest in the subject."[63]

The principal case is one of first impression in Florida. In ruling that absolute privilege is available to a county manager acting within the scope of his employment, the court adopted the federal position enunciated in *Barr v. Matteo*.[64] In addition, the test of high rank was scorned as a distinction without meaning. The court based its decision firmly on the ground of policy by asserting the "desirability . . . of extending to the executive branch *at all levels* the same immunity that has for ages been accorded the legislative and judicial branches."[65] Current Florida law on the subject of absolute privilege of executive public officials as a defense against defamation committed within the scope of their duties has been afforded both by the clear guidelines of settled law,[66] and through the medium of the *McNayr* case. This decision will permit the executive public official to do his job unfettered by the fear of expensive and time-consuming litigation. It is hoped that an enlightened electorate can act to restrain abuses of the privilege.

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functionary appointed by court of competent jurisdiction are absolutely privileged). See, Coogler v. Rhodes, 38 Fla. 240, 21 So. 109 (1897), which clarified absolute privilege with reference to words spoken or written in certain legislative and judicial proceedings.

61. FLA. STAT. § 443.16(3) (1965) Privileged communications: All letters, reports, communications, or any other matters either oral or written, from the employer or employee to each other or to the commission or any of its agents, representatives or employees which shall have been written, sent, delivered, or made in connection with the requirements and administration of this chapter, shall be absolutely privileged and shall not be made the subject matter or basis for any suit for slander or libel in any court of the State of Florida.

See Greene v. Hoiriis, 103 So.2d 226 (Fla. 3d Dist. 1958) for application of this statute.

62. Robertson v. Industrial Ins. Co., 75 So.2d 198 (Fla. 1954).

63. Leonard v. Wilson, 150 Fla. 503, 505, 8 So.2d 12, 14 (1942).

64. *Supra* note 16.

65. McNayr v. Kelly, 184 So.2d 428, 429 (Fla. 1966) (Emphasis added.).

66. See Saxon v. Knowles, 185 So.2d 193 (Fla. 4th Dist 1966), for the Florida case first citing the principal case as precedent. *Saxon* held that an executive government official (city manager) is to be granted absolute immunity for defamatory publications made intentionally or negligently in connection with the performance of the duties and responsibilities of his office.